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March 24, 2010

Via Federal Express

Cynthia T. Brown
Chief of the Section of Administration
Office of Proceedings
Surface Transportation Board
395 E. Street, S.W.
Washington, DC 20423

ENTERED
Office of Proceedings
MAR 25 2010
Part of
Public Record

Re: SAN FRANCISCO BAY RAILROAD – MARE
ISLAND PETITION FOR DECLARATORY ORDER –
LENNAR MARE ISLAND, AND PURSUANT TO 49
U.S.C. §11123 AND 49 C.F.R. §1146.1 (b)(1)(i) FOR
EXPEDITED RELIEF DUE TO UNAUTHORIZED
CESSATION OF OPERATIONS,
FD-35360

Dear Ms. Brown:

Enclosed please find the original and 13 copies of petitioners request for leave to file a reply to the answers of the City of Vallejo and Lennar Mare Island, LLC on the petitioners request for Expedited Relief Due to Unauthorized Cessation of Operations, together with a CD disk containing this letter and the same material in Microsoft Word 1997-2003 format.

I would appreciate it if you would stamp the extra copies and return one to the undersigned and one to the railroad in the self addressed Federal Express envelopes enclosed.

Thank you for your attention to this matter.

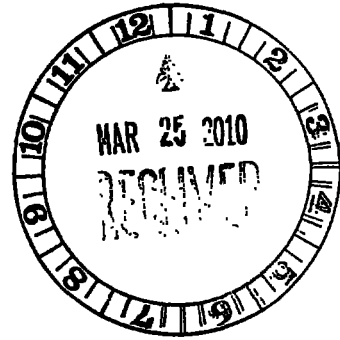
Very truly yours,



John F. McHugh

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35360



**SAN FRANCISCO BAY RAILROAD – MARE ISLAND
PETITION FOR DECLARATORY ORDER – LENNAR MARE
ISLAND**

**AND PURSUANT TO 49 U.S.C. §11123 AND 49 C.F.R. §1146.1
(b)(1)(i) FOR EXPEDITED RELIEF DUE TO UNAUTHORIZED
CESSATION OF OPERATIONS**

**PETITIONERS VERIFIED REQUEST FOR LEAVE TO FILE
REPLY**

**ENTERED
Office of Proceedings
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Public Record**

Petitioner requests that the Board allow it to respond to the replies of the City of Vallejo (“the City”) and Lennar Mare Island LLC (“LMI”) as to the petition for an emergency service order to clarify and correct the record as follows.

1. The Notice of Exemption clearly states that the railway in issue was on land owned by the City and LMI. It asserted correctly that the incumbent carrier was the California Northern Railroad as fully explained below.

2. The instant petition is supported by the letters and e-mails from shippers who state how many carloads they have been forced to divert to

transload facilities since their service was suspended in 2008 and stating that the loss of service had a substantial cost and placed them in a permanent competitive disadvantage, Exhibits E-J.

3. LMI and the City admit that California Northern Railroad (“CFNR”) was providing service on the island before LMI and the City took ownership of the land and that CFNR continued to provide that service after the License it was granted by the Navy expired, see *ex Thompson v. Texas-Mexican Ry.* 328 U.S.134 (1946) (operating rights and obligations or rights to use required lands do not expire with the termination of a land use agreement). Several shippers have stated that they were receiving regular rail service from the CFNR prior to the acquisition of the line by the City of Vallejo and LMI, (Exhibits E, F, G) confirming that common carrier service was provided using this line. As a matter of law CFNR was the incumbent carrier when Petitioner’s Notice of Exemption was filed, 49 U.S.C. 10901(a). As this line has no mile posts, the limit of CFNR’s authority could not be defined by mile posts, but it can be defined by the use of the term “including all branches” and the map in the CFNR’s notice of exemption which clearly shows Mare Island to be a station which was to be served by CFNR Operating Company as successor to Parksiera Corp.

4. This line has been used since at least 1996 to provide common carrier freight service and therefore it is a line of railroad within the Board's jurisdiction even if temporarily idle, see: *City Of Jersey City, Rails To Trails Conservancy, Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition, And New Jersey State Assemblyman Louis M. Manzo—Petition For Declaratory Order No. 34818* (August 8, 2007).

5. The letters from shippers state that business on Mare Island did not dry up due to market or other business considerations. LMI simply terminated service as of March 31, 2008 (Exhibit Q) causing all shippers to switch to truck upon receiving that notice. Some traffic ceased due to service charges imposed by LMI, Exhibit P. Thus, to the extent that there is little demand as of this minute, that lack of traffic is a condition created by LMI not by the market.

6. LMI controls all lands that are subject to the redevelopment plan, and it has leased facilities to various rail shipper entities, on terms that allow it to terminate their leases at will. Rail service must be provided only to customers who demand it. As redevelopment displaces entities that require rail service, service in that area of the Island will not be required. LMI cannot remove track serving rail customers that own their own facilities and are outside the redevelopment area of the Island. Thus, SFBR-MI's operations, even if perpetual, should not interfere with the rehabilitation and

redevelopment of the Island. Further, where remediation work is required, rail service can be suspended to facilitate that condition for a reasonable period of time on reasonable notice to shippers and to SFBR-MI, provided SFBR-MI is allowed to transload at the closest reachable point to the shipper. The contract offered by LMI forbade all transloading.

(**Errata**, in the petition, petitioner incorrectly referred to Exhibits A and R on page 22. This reference should be to clauses of the proposed LMI contract and should be to Exhibit R ¶¶5 (a)(ii) (no transloading) and (b) (subjecting service to LMI's rules) and ¶ 6 (to such fees as LMI shall impose from time to time).


However, the map submitted by LMI clearly shows that it seeks to retain the option to remove service entirely, see LMI exhibit A-3 area designated F.

7. LMI's proposed in-house operator asked for rates not to serve any customer but to determine if it was practical to do so, Exhibit O. Before this action was filed SFBR-MI proposed a per car rate to that operator. SFBR-MI had previously provided per car rates to the shippers, one of which has demanded service. Petitioner is providing service to Alstom.

8. Both Petitioner's short-term and draft long-term agreements with the City of Vallejo require petitioner to obtain operating authority from the Surface Transportation Board, Exhibit K Article X, pages 6-7 and Exhibit L Section V §5.02 page 6. Petitioner is a rail common carrier within the

jurisdiction of the Board, see: *SMS Rail Service Inc.-Petition for a
Declaratory Order*, FD-34483 (January 19, 2005).

Dated, New York, N.Y.
March 24, 2010



John F. McHugh
6 Water Street
New York, N.Y. 10004

VERIFICATION

David Gavrich declares under penalty of perjury pursuant to 28 U.S.C §1746 that I am the president of the San Francisco Bay Railroad-Mare Island, I have reviewed the information contained in this proposed reply and know it to be correct of my own knowledge or based upon documents filed in this matter.

Dated, March 24, 2010
San Francisco, CA



David Gavrich

CERTIFICATE OF SERVICE

Sylvia Cruz declares pursuant to 28 U.S.C. 1746 that on this 24th day of March, 2010 she served a copy of the petitioners request for leave to file a reply upon:

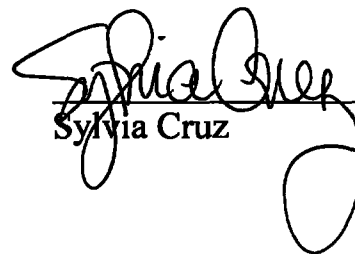
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By Federal Express.

Dated, New York, N.Y.
March 24, 2010


Sylvia Cruz